

**COPY**

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION  
SPRINGFIELD, ILLINOIS

**RECEIVED**  
DEC 10 2002

Illinois Commerce Commission  
RAIL SAFETY SECTION

ILLINOIS COMMERCE COMMISSION )  
 )  
vs. ) No. T02-0076  
 )  
NORFOLK SOUTHERN RAILWAY )  
COMPANY )

**MEMORANDUM IN SUPPORT OF MOTION TO STRIKE**  
**OR IN THE ALTERNATIVE MODIFY THE MEMORANDUM**  
**IN SUPPORT OF THE RECOMMENDATION**

Comes now Norfolk Southern Railway Company by and through its counsel, Charles J. Swartwout and the attorneys of Gundlach, Lee, Eggmann, Boyle & Roessler, moves to strike or in the alternative modify the memorandum in support of the recommendation to accurately and unambiguously reflect that Norfolk Southern's compliance was with the agreement with ICC counsel and staff. In support of its motion, Norfolk Southern Railway Company states:

**BACKGROUND**

On October 28, 2002 the Illinois Commerce Commission issued an order which stated that, "Notice is hereby given that the Commission in conference on October 23, 2002 granted the Motion to Dismiss the Citation." (Exhibit A). Norfolk Southern has no disagreement with the Order. Norfolk Southern did not receive the order until November 15, 2002. Attached to the order is a memorandum from Administrative Law Judge Korte to the Commission. (Exhibit B). Norfolk Southern did not receive the order until November 15, 2002. The memorandum states that on "September 13, 2002 a hearing was held at the Commission's Springfield office, and that at the hearing the Special Assistant Attorney General for the Commission joined with counsel for the railroad in requesting continuance until September 18, 2002 in order to allow the railroad time to

**DOCKETED**

clear the vegetation obstructing motorists view along the railroad's right-of-way." The memorandum further states that on "September 18, 2002, the parties reconvened and represented to the ALJ that the ROW had been cleared and the railroad was in compliance with the brush-cutting rule." The memorandum further states that "since the violation no longer exists the citation is moot and should be dismissed".

### **ARGUMENT**

This memorandum either misconstrues or is ambiguous as to what occurred at the hearing as well as the agreement and understanding of the parties. Norfolk Southern has never admitted or agreed that a violation of 92 IL Admin. Code 1535.205 ever existed, so the agreement was not that the citation was dismissed because the railroad is now in compliance with said rule. Norfolk Southern made its position on Rule 205 clear through its filings, and its statements at the hearing on the record. In accord therewith, the statement that "the parties" represented to the ALJ that the railroad was "in compliance with the brush-cutting rule" is incorrect.

After receiving the original August 7, 2002 citation, the Norfolk Southern Railway company sought injunctive relief against the Illinois Commerce Commission based in part on the fact that the regulation, 92 IL Admin. Code 1535.205, was unconstitutionally vague. Norfolk Southern Railway Company raised the argument that various terms in the regulation are not defined, and distances are not explained as to from where the measurement is taken. After the temporary restraining order was dissolved, and Norfolk Southern Railway Company appeared in front of the Commission, it filed motions again challenging the constitutionality of 92 IL Admin. 1535.205. In addition to challenging the language of the regulation as being unconstitutionally vague, Norfolk Southern also challenged the way in which the way in which the regulation was enforced. Norfolk Southern

maintains and still maintains that the regulation was applied in an arbitrary and capricious manner and is otherwise unconstitutional. At the aforementioned hearing, Norfolk Southern represented that it was in compliance with an agreement with the ICC counsel and staff that the Citation would be dismissed without finding a violation, without admission of violation on behalf of Norfolk Southern Railway Company in light of the very strenuous problems with the application of the Rule and its meaning.

With respect to the crossing at issue, Norfolk Southern has never admitted that at any time, and so stated its denial on the record that it was in violation of 92 IL Admin. Code 1535.205. As evidenced by the numerous filings made with the Illinois Commerce Commission, Norfolk Southern was challenging the Rule, and as applied was in compliance with the Rule. Although Norfolk Southern maintains they were in compliance with the statute, based on an agreement with the Illinois Commerce Commission's counsel and staff, Norfolk Southern agreed to go out to the crossing and resolve any questions the staff may have had. Norfolk Southern did not do this in order to be in compliance with the Rule, but in order to be a good corporate citizen. As Norfolk Southern believed this would be the appropriate way of resolving everyone's concerns. Norfolk Southern never represented to the ALJ that the railroad was in compliance with the brush-cutting rule.

Norfolk Southern repeatedly states that it was never in violation of the Rule, and therefore the citation was not dismissed because Norfolk Southern was then in "compliance". At the hearing on September 13, 2002 Judge Korte stated that "in the interim the Norfolk Southern is going to undertake immediately the clearing of the, at least cutting of the brush, in accordance with the rule as set forth in the Commission's rule." (Exhibit C). Whereupon Norfolk Southern's attorney, Mr. Charles Swartwout stated "It is my understanding though that the rule was not an issue. We want

to address their safety concerns." Id. Judge Korte responded "Well the rule - as far as I am concerned, the whole premise for the citation, counsel, is the rule. What I'm saying to you is that my understanding of your agreement is that this is what's going to happen. Staff will go down and they are satisfied with what you do at that location or your crew does and they come back to me and report on Wednesday that they are in agreement and that there is no longer a need for this citation proceeding, then I will recommend that the citation be dismissed. That's my understanding. Not putting any words in anybody's mouth, but that's my understanding. Do you agree with that?" Mr. Swartwout responded "The latter I agree with, your honor." Id.

Norfolk Southern and the Illinois Commerce Commission's counsel and staff agreed that instead of arguing whether or not Norfolk Southern was in compliance, or whether or not the regulation was constitutional, Norfolk Southern would address all the Illinois Commerce Commissions's staff's concerns about the crossing.

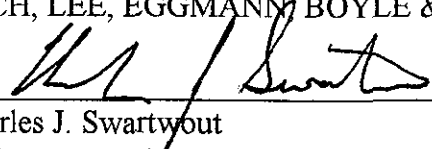
At the hearing on September 18, 2002 Mr. Swartwout again drew Administrative Law Judge Korte's attention to the fact that he was misconstruing the agreement. Judge Korte stated "Okay. Fine. I guess what you're saying is that the railroad is in compliant - is in compliance with the rule at this time." Mr. Swartwout responded to the judge's statement by saying "Your honor, in accord with our in camera discussion, I want to reiterate that it was our understanding it is the agreement that the citation would be dismissed without a finding of violation, without admission of violation on behalf of Norfolk Southern Railway Company and in light of the very strenuous problems we had with the application of the rule and its meaning as well we would like an opportunity if we could to view the proposed order." Judge Korte "I'm sorry, counsel. There is not going to be a proposed order because we didn't have an evidentiary hearing." (Exhibit D).

Judge Korte's memorandum misconstrues the character of the agreement. At the hearings, Mr. Swartwout clarified the agreement for the judge. Because Norfolk Southern never admitted that it was in violation of the regulation, and because there was no evidentiary hearing in which evidence was taken, there is no way that the Commission can conclude anything other than the agreement was met and that the staff believed there was no longer a need for a hearing to determine if a violation exists. For purpose of clarifying the nature of the agreement, the memorandum should be stricken or modified to reflect a dismissal based upon compliance with the ICC counsel's and staff's resolution agreement with Norfolk Southern.

At the hearing, no evidence was introduced, and no findings were made. Because there was no evidence of a violation, and because Norfolk Southern never admitted a violation, the ALJ cannot state that a violation existed. Judge Korte's memorandum indicates that at some point a violation existed. Without evidence or admission such a statement concerning a violation should be stricken or at least clarified to reflect that the term "violation" was an allegation of a violation. Further, in light of the serious problems with the language and application of Rule 205 and reference indicating that Norfolk Southern was "in compliance" with the Rule should be changed to clarify that Norfolk Southern was in compliance with its agreement with Illinois Commerce Commission's counsel and staff.

GUNDLACH, LEE, EGGMANN, BOYLE & ROESSLER

By: \_\_\_\_\_

  
Charles J. Swartwout

Andrew C. Corkery

Attorney for Norfolk Southern Railway Company

5000 West Main Street, Box 23560

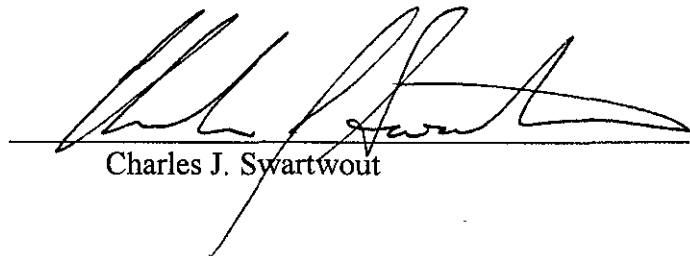
Belleville, IL 62223-0560

**PROOF OF SERVICE**

The undersigned certifies that a copy of the attached document was deposited in the United States Mail on December 10, 2002, in Belleville, Illinois, with proper postage prepaid, addressed to each of the following with the stated address appearing on the envelope:

Kevin Sharpe  
Director of Processing and Information  
Illinois Commerce Commission  
527 East Capitol Avenue  
Springfield, Illinois 62701

Gary Schechter  
Special Assistant Attorney General  
Attorney for Illinois Commerce Commission  
527 East Capitol Avenue  
Springfield, Illinois 62701



Charles J. Swartwout



## ILLINOIS COMMERCE COMMISSION

October 28, 2002

Illinois Commerce Commission  
On Its Own Motion

-VS-

Norfolk Southern Railway Company

Citation with respect to the Norfolk Southern Railway Company to show cause why it has not complied with the minimum requirements of 92 IL Adm. Code 1535.205 at the public at-grade crossing of Stanford Road/TR444 (DOT 724 758R) located in Webber Road District, Jefferson County, Illinois.

T02-0076

TO ALL PARTIES OF RECORD:

### NOTICE OF COMMISSION ACTION

Notice is hereby given that the Commission in conference on October 23, 2002, granted the *Motion to Dismiss the Citation*.

A handwritten signature in black ink, appearing to read "Rick Korte".

Rick Korte  
Chief Administrative Law Judge  
Review and Examination Program

Railroad Staff: Mr. Berry

EXHIBIT

A

Docket No.: T02-0076  
Conf. Date: October 23, 2002

### MEMORANDUM

To: The Commission  
From: Rick Korte, ALJ  
Date: September 18, 2002  
Subject: Illinois Commerce Commission,  
On Its Own Motion,

vs.

Norfolk Southern Railway Company.

Recommendation: Dismiss the Citation.

### DISCUSSION

On August 7, 2002, the Commission entered a Citation requiring the Norfolk Southern Railway Company to appear at a Hearing and show cause why they have not complied with the minimum requirements of 92 Illinois Administrative Code Part 1535.205, commonly referred to as the "brush-cutting rule", at the Stanford Road public highway/rail grade crossing located in Webber Road District, Jefferson County, Illinois. The Citation was entered based on Staff's investigation, which found vegetation existing along the Railroad's right-of-way that materially obscured the view of approaching trains to motorists on the roadway.

On August 26, 2002, a Temporary Restraining Order was issued by the Seventh Judicial Circuit Court of Sangamon County, preventing the Commission from holding its Citation Hearing scheduled for August 28, 2002. On September 5, 2002, the TRO was dissolved and the Commission's Citation Hearing was rescheduled for September 13, 2002.

On September 13, 2002, a hearing was held at the Commission's Springfield Office. The Special Assistant Attorney General for the Commission joined with counsel for the Railroad in requesting a continuance until September 18, 2002, in order to allow the Railroad time to clear the vegetation obstructing motorists view along the Railroad's ROW.

On September 18, 2002, the parties reconvened and represented to the ALJ that the ROW had been cleared and the Railroad was in compliance with the brush-cutting rule. Since the violation no longer exists the Citation is moot and should be dismissed.

EXHIBIT

B



Transportation Minutes  
Bench Session  
October 23, 2002  
Page 6

R-10. T02-0042

The Department of Transportation of the State of Illinois, for an on behalf of the People of the State of Illinois, Petitioner vs. The Indiana Harbor Belt Railroad Company, an Indiana Corporation; and Unknown Owners, Respondents

RE: Petition for approval of the taking or damaging of certain properties owned by a public utility in Cook County, Illinois by exercising the right of eminent domain. Parcel No. OEJ0001PE and OEJ0001TE.

All present voted aye to enter Order dismissing the petition.

R-11. T02-0063

Burlington Northern and Santa Fe Railway Company, and City of Earlville, LaSalle County, Illinois, Petitioners, V. State of Illinois Department of Transportation, Respondent.  
Petition seeking an order from the Illinois Commerce Commission authorizing permanent closure and removal of the grade crossing located at the intersection of Ottawa Street, in the City of Earlville, LaSalle County, Illinois and the trackage of the Burlington Northern and Santa Fe Railway Company at milepost 72.14, DOT No. 079 627H.

All present voted aye to enter Order approving closure and payment of incentive funds for voluntary closing of a crossing.

R-12. T02-0076

Illinois Commerce Commission, On Its Own Motion vs Norfolk Southern Railway Company  
RE: Citation with respect to the Norfolk Southern Railway Company to show cause why it has not complied with the minimum requirements of 92 IL Adm. Code 1535.205 at the public at-grade crossing of Stanford Road/TR444 (DOT 724 758R) located in Webber Road District, Jefferson County, Illinois.

All present voted aye to dismiss the Citation

STENOGRAPHIC TRANSCRIPT OF PROCEEDINGS

BEFORE THE

**Illinois Commerce Commission**

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DOCKET NO. T02-0076

IN THE MATTER OF:

ILLINOIS COMMERCE COMMISSION On Its Own Motion

vs.

NORFOLK SOUTHERN RAILWAY COMPANY

---

PLACE: Springfield, Illinois

DATE: September 13, 2002

PAGES: 1 - 8

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SULLIVAN REPORTING COMPANY

OFFICIAL REPORTERS

TWO NORTH LA SALLE STREET

SUITE 1780

CHICAGO, ILLINOIS 60602

312-782-4705

SPRINGFIELD, ILLINOIS

217-528-6964

EXHIBIT

C

SEP 30 2002

BEFORE THE  
ILLINOIS COMMERCE COMMISSION

ILLINOIS COMMERCE COMMISSION ) DOCKET NO.  
On Its Own Motion ) T02-0076  
vs. )  
NORFOLK SOUTHERN RAILWAY COMPANY )  
Citation with respect to the Norfolk )  
Southern Railway Company to show )  
cause why it has not complied with )  
the minimum requirements of 92 IL )  
Adm. Code 1535.205 at the public )  
at-grade crossing of Stanford Road/ )  
TR444 (DOT 724 758R) located in )  
Webber Road District, Jefferson )  
County, Illinois. )

Springfield, Illinois  
September 13, 2002

Met, pursuant to notice, at 10:00 A.M.

BEFORE:

MR. RICK KORTE, Administrative Law Judge

APPEARANCES:

MR. ANDREW C. CORKERY  
MR. CHARLES SWARTWOUT  
Gundlach, Lee, Eggmann, Boyle & Roessler  
5000 West Main Street  
P.O. Box 23560  
Belleville, Illinois 62223-0560

(Appearing on behalf of Norfolk Southern  
Railway Company)

SULLIVAN REPORTING COMPANY, by  
Carla J. Boehl, Reporter  
Ln. #084-002710

## APPEARANCES:

(Cont'd)

MR. NEIL F. FLYNN  
1035 South Second Street  
Springfield, Illinois

(Appearing on behalf of the Norfolk and  
Western Railway Company.)

MR. GARY SCHECHTER  
527 East Capitol Avenue  
Springfield, Illinois 62701

(Appearing on behalf of the Staff of the  
Illinois Commerce Commission.)

I N D E XWITNESSESDIRECT CROSS REDIRECT RECROSS

(None)

I N D E XEXHIBITSMARKEDADMITTED

(None)

PROCEEDINGS

JUDGE KORTE: Let's come to order, please.

This case is identified as T02-0076. It is a citation issued by the Illinois Commerce Commission against the Norfolk Southern Railway Company. The citation was basically with respect to show cause why the railroad had not complied with the minimum requirements of 92 Illinois Admin. Code 1535.205 at a public grade crossing at Stanford Road which was located at Jefferson County. We have had an in camera discussion -- before we go any further, let's get our entries of appearance on the record and then we will go further. To my left, counsel?

MR. CORKERY: Andrew Corkery, C-O-R-K-E-R-Y, representing Norfolk Southern.

MR. FLYNN: Neil F. Flynn, business address 1035 South Second Street, Springfield, Illinois, also appearing on behalf of respondent Norfolk Southern Railway Company.

MR. SWARTWOUT: Charles Swartwout, S-W-A-R-T-W-O-U-T, Gundlach, Lee, Eggmann, Boyle and Roessler, P.O. Box 23560, 5000 West Main,

1 Belleville, Illinois 62223, appearing on behalf of  
2 the Norfolk Southern.

3 JUDGE KORTE: And for the Commission?

4 MR. SCHECHTER: Gary Schechter,  
5 S-C-H-E-C-H-T-E-R, Special Assistant Attorney  
6 General, representing Staff of the Illinois Commerce  
7 Commission, 527 East Capitol, Springfield, Illinois  
8 62701.

9 JUDGE KORTE: Thank you, counsel. Note for the  
10 record no other appearances on this matter.

11 I started to say that we had an in camera  
12 discussion with myself and all of the counsel of  
13 record concerning this particular matter. And what  
14 we have -- what the parties have come to agreement  
15 on, at least at this juncture, is that we will  
16 continue this case til Wednesday of next week at  
17 10:00 a.m. here in Springfield.

18 In the interim, the Norfolk Southern is  
19 going to undertake immediately the clearing of the,  
20 at least cutting of the brush, in accordance with  
21 the rule as set forth in the Commission's rule.  
22 Staff is going to accompany the Norfolk Southern

1 crew. I believe counsel indicated that they would  
2 be hiring -- might not be Norfolk Southern's  
3 employees -- but they were contracting with a crew  
4 to go down there and begin this brush cutting.  
5 Staff will go down to the site, and once Staff has  
6 viewed the site, hopefully, when you come back, you  
7 will be in accordance or you believe that they are  
8 in accordance with the rule and you are satisfied  
9 with the cutting at that juncture.

10 Again, we will be back here on Wednesday at  
11 10:00 to see if Staff believes that that has -- that  
12 the rule has been complied with at least at this  
13 juncture. If that happens, then what will happen is  
14 I will recommend to the Commission that the citation  
15 be dismissed. And I believe that's the  
16 understanding amongst parties at this time. Is that  
17 correct, Mr. Schechter?

18 MR. SCHECHTER: That is correct, Your Honor.

19 JUDGE KORTE: Mr. Swartwout?

20 MR. SWARTWOUT: Yes, we are going to go down --  
21 it is my understanding that Staff is going to go  
22 down with us to address their safety concerns.



1 JUDGE KORTE: Correct.

2 MR. SWARTWOUT: It was my understanding,  
3 though, that the rule was not an issue. We want to  
4 address their safety concerns.

5 JUDGE KORTE: Well, the rule -- as far as I am  
6 concerned, the whole premise for the citation,  
7 counsel, is the rule. And what I am saying to you  
8 is that my understanding of your agreement is that  
9 this is what's going to happen. Staff will go down  
10 and they are satisfied with what you do at that  
11 location or your crew does and they come back to me  
12 and report on Wednesday that they are in agreement,  
13 that there is no longer a need for this citation  
14 proceeding, then I will recommend that the citation  
15 be dismissed. That's my understanding. Not putting  
16 any words in anybody's mouth, but that's my  
17 understanding. Do you agree with that?

18 MR. SWARTWOUT: The latter I agree with, Your  
19 Honor.

20 JUDGE KORTE: Mr. Schechter?

21 MR. SCHECHTER: Yes, Your Honor.

22 JUDGE KORTE: All right. There is nothing

1 further at this time, I believe. So we will stand  
2 adjourned and recess until Wednesday at 10:00 a.m.  
3 here in Springfield.

4 Notice on the record, I am not going to  
5 provide written notice to you. Notice on the  
6 record. Okay, we are adjourned.

7 (Whereupon the hearing  
8 in this matter was  
9 continued until  
10 September 18, 2002, at  
11 10:00 a.m. in  
12 Springfield, Illinois.)  
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1 STATE OF ILLINOIS       )  
                                      )SS  
2 COUNTY OF SANGAMON     )  
CASE NO.: T02-0075  
3 TITLE: ICC vs. NORFOLK SOUTHERN RAILWAY COMPANY

4                   CERTIFICATE OF REPORTER

5           I, Carla J. Boehl, do hereby certify that I am a  
6 court reporter contracted by Sullivan Reporting  
7 Company of Chicago, Illinois; that I reported in  
8 shorthand the evidence taken and proceedings had on  
9 the hearing on the above-entitled case on the 13th  
10 day of September, 2002; that the foregoing pages are  
11 a true and correct transcript of my shorthand notes  
12 so taken as aforesaid and contain all of the  
13 proceedings directed by the Commission or other  
14 persons authorized by it to conduct the said hearing  
15 to be so stenographically reported.

16           Dated at Springfield, Illinois, on this 23rd day  
17 of September, A.D., 2002.

18  
19                               *Carla Boehl*  
                                      \_\_\_\_\_

20                   Certified Shorthand Reporter  
21  
22

STENOGRAPHIC TRANSCRIPT OF PROCEEDINGS

BEFORE THE

**Illinois Commerce Commission**

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DOCKET NO. T02-0076

IN THE MATTER OF:

ILLINOIS COMMERCE COMMISSION  
On Its Own Motion

vs.

NORFOLK SOUTHERN RAILWAY COMPANY

---

PLACE: Springfield, Illinois

DATE: September 18, 2002

PAGES: 9 - 16

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SPRINGFIELD, ILLINOIS

217-628-6984

EXHIBIT

D

OCT - 9 2002

BEFORE THE  
ILLINOIS COMMERCE COMMISSION

ILLINOIS COMMERCE COMMISSION,  
On Its Own Motion

Vs.

NORFOLK SOUTHERN RAILWAY COMPANY

) Docket No.  
) T02-0076

Citation with respect to the Norfolk  
Southern Railway Company to show cause  
why it has not complied with the  
minimum requirements of 92 IL Admin.  
Code 1535.205 at the public at-grade  
crossing of Stanford Road/TR444  
(DOT 724 758R) located in Webber Road  
District, Jefferson County, Illinois.

Springfield, Illinois  
September 18, 2002

Met, pursuant to notice, at 10:00 a.m.

BEFORE:

MR. RICK KORTE, Administrative Law Judge

APPEARANCES:

MR. NEIL F. FLYNN  
1035 South Second Street  
Springfield, Illinois 62704

(Appearing on behalf of Norfolk  
Southern Railway Company)

SULLIVAN REPORTING COMPANY  
By Jami Tepker, Reporter  
CSR# 084-003591

## APPEARANCES:

(CONT.'D)

MR. CHARLES J. SWARTWOUT

5000 West Main Street

Belleville, Illinois 62223

(Appearing on behalf of Norfolk  
Southern Railway Company)

MR. GARY SCHECHTER

Special Assistant Attorney General

527 East Capitol Avenue

Springfield, Illinois 62794

(Appearing on behalf of the Illinois  
Commerce Commission Staff.)

## I N D E X

WITNESSES

DIRECT CROSS REDIRECT RECROSS

None.

## E X H I B I T S

NUMBER

IDENTIFIED

ADMITTED

None.

## PROCEEDINGS

JUDGE KORTE: This case is identified as T02-0076. Again, this is a matter with the Illinois Commerce Commission with the Norfolk Southern Railway Company.

This was a citation issued by the Commission to the Norfolk Southern Railway asking the Railroad to show cause -- not rule to show cause but to show cause why it had not complied with the requirements of 92 IL Admin. Code 1535.205, commonly referred to as the brush-cutting rule, at public grade crossing I believe it's identified as Stanford Road located in Webber Road District, Jefferson County, Illinois.

Let's go and get our appearances on the record. Start to my left.

MR. FLYNN: Yes. For the record, my name is Neil F. Flynn. My business address is 1035 South Second Street, Springfield, Illinois 62704. I'm attorney of record for Respondent Norfolk Southern Railway Company.

MR. SWARTWOUT: Charles J. Swartwout,



1 S-w-a-r-t-w-o-u-t, P.O. Box 23560, 5000 West Main,  
2 Belleville, Illinois 62223, on behalf of Respondent  
3 Norfolk Southern Railway Company.

4 MR. SCHECHTER: Gary Schechter,  
5 S-c-h-e-c-h-t-e-r, Special Assistant Attorney  
6 General representing the Staff of the Illinois  
7 Commerce Commission, 527 East Capitol, Springfield,  
8 Illinois.

9 JUDGE KORTE: Thank you.

10 Note for the record no other appearances  
11 at this time.

12 As you all recall, last Friday we had an  
13 evidentiary hearing scheduled would have been  
14 Friday, September the 13th, for ten o'clock. At  
15 that time counsel -- actually I should say prior to  
16 that counsel requested in camera to discuss a  
17 possible resolution of the citation.

18 Counsel for the Commission and Railroad  
19 indicated on the record that they had in fact  
20 reached an agreement to resolve the matter. The  
21 agreement briefly was that the Norfolk Southern  
22 would immediately undertake clearing of the right of

1 way or its right of way, I should say, at the  
2 crossing in question and that they would be given  
3 until today at ten o'clock, which is September the  
4 18th, Wednesday, September the 18th, to accomplish  
5 that task.

6 Also the Staff or a member of the Railroad  
7 Staff of the Commission was to go down and verify  
8 that the right-of-way clearing had been accomplished  
9 and that the Railroad had come into compliance with  
10 the admin rule.

11 At this juncture I'm just curious, Mr.  
12 Schechter, if you have spoken with a member of the  
13 Staff. Did you send a member of the Staff to that  
14 location?

15 MR. SCHECHTER: We did, Your Honor. And I have  
16 spoken with John Blair of the Commission's Railroad  
17 Safety Staff who viewed the site both before and  
18 after the Railroad took it's action. Mr. Blair  
19 informs me that he at this time believes that there  
20 is, at that crossing there is no violation of any  
21 Commission rule regarding the --

22 JUDGE KORTE: Okay. Fine. I guess what you're

1 saying is that the Railroad is compliant -- is in  
2 compliance with the rule at this time?

3 MR. SCHECHTER: Yes, Your Honor.

4 JUDGE KORTE: All right. Based on that, then  
5 what I will do is recommend the citation be  
6 dismissed.

7 Anything further, gentlemen?

8 MR. SWARTWOUT: Your Honor, in accord with our  
9 in-camera discussion, I want to reiterate that it  
10 was our understanding it is the agreement that the  
11 citation would be dismissed without finding a  
12 violation, without admission of violation on behalf  
13 of Norfolk Southern Railway Company in light of the  
14 very strenuous problems we had with the application  
15 of the rule and its meaning as well as we would like  
16 and opportunity if we could to view the proposed  
17 order.

18 JUDGE KORTE: I'm sorry, Counsel. There's not  
19 going to be a proposed order because we didn't have  
20 an evidentiary hearing.

21 MR. SWARTWOUT: Okay.

22 JUDGE KORTE: What we're going to do is dismiss

1 the citation. It was a citation strictly. Had we  
2 had an evidentiary hearing, then we would have been  
3 required to issue an order. There will be no order  
4 issued in this particular matter.

5 What we will do is recommend -- and I'm  
6 sure the Commission will go along -- that the  
7 citation be dismissed because at this juncture at  
8 least Staff believes that you're in compliance with  
9 the rule. Okay.

10 Nothing further, then we'll mark the  
11 record heard and taken.

12 HEARD AND TAKEN.  
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1 STATE OF ILLINOIS )  
2 ) SS  
COUNTY OF SANGAMON )  
3 CASE NO: T02-0076  
4 TITLE: ILLINOIS COMMERCE COMMISSION, On Its Own Motion  
vs. NORFOLK SOUTHERN RAILWAY COMPANY  
5

6 CERTIFICATE OF REPORTER

7 I, Jami Tepker, do hereby certify that I am a court  
8 reporter contracted by SULLIVAN REPORTING COMPANY of  
9 Chicago, Illinois; that I reported in shorthand the  
10 evidence taken and proceedings had on the hearing of the  
11 above-entitled case on the 18th day of September, 2002;  
12 that the foregoing seven pages are a true and correct  
13 transcript of my shorthand notes so taken as aforesaid; and  
14 contain all of the proceedings directed by the Commission  
15 or other persons authorized by it to conduct the said  
16 hearing to be so stenographically reported.

17 Dated at Springfield, Illinois, on this 30th day of  
18 September, A.D., 2002.  
19  
20

21 Jami Tepker  
Reporter  
22